No.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

MARY ZACHARIE BROCK, ET AL.,
Petitioners,

VS.

BARNSDALL OIL COMPANY, ET AL.,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

The opinion herein on original submission appears at page 764 of record; also, at page 699 of 118 Fed. (2d). The concurring opinion of Circuit Judge Sibley, on motions for rehearing, appears on page 797 of record and also on page 702 of 118 Fed. (2d).

II.

GROUNDS OF JURISDICTION

It is believed that the jurisdiction of this court is sufficiently shown on page 5 of the petition for certiorari and that further statement of grounds of jurisdiction is unnecessary.

III.

STATEMENT OF THE CASE

Your petitioners here refer to and adopt the Statement commencing at page 2 of their petition for certiorari.

Here supplementing that Statement:

Pursuant to a pre-trial conference, the District Court entered an order, duly approved by attorneys of record for all of the parties hereto, which among other things provided that all the parties hereto should, within a stated time, file such of their respective abstracts of title, title papers and other documentary evidence as might be regarded by the several parties hereto as relevant or material in the determination of the validity vel non of the alleged conveyance to Robert Mott from Samuel W. Fullerton as administrator pro tempore of the estate of John Peter Schatzell, deceased, which is mentioned in opinion of Circuit Court of Appeals herein; also, that if the trial court should find and hold that the instrument of date March 1, 1860, executed and delivered by Fullerton as administrator pro tempore of estate to Robert Mott and the proceedings with respect thereto had in County Court of Nueces County, Texas, sitting in probate, and said documentary evidence so to be filed within a stated time by the litigants were legally sufficient to pass, and did pass, the title to the land involved herein and that said title was thereby vested in said Robert Mott, then neither your petitioners as plaintiffs nor said intervening plaintiffs asserting title as alleged heirs at law of John Peter Schatzell, deceased, should recover herein, and that in any such event title to said land would be adjudged by the court to and among the several defendants as their respective interests might appear. (R., 27 and 28)

As no question arises herein with respect to the pleadings of any of the parties hereto, it is considered unnecessary even to summarize such pleadings.

The district judge filed findings of fact and conclusions of law under Rule 52 of the Federal Rules of Civil Procedure. (R., 369 et seq.)

The only fact findings deemed material or relevant at this stage of the proceedings may be thus briefly stated:

John Peter Schatzell died in Nueces County, Texas, on October 23, 1854. On the next day thereafter County Court of Nueces County, in the exercise of its admitted probate jurisdiction, appointed administrators pro tem. of estate, who immediately qualified. On November 4, 1854, following due notice, said court appointed the same men as permanent administrators of estate, and they immediately qualified and soon thereafter filed an inventory, appraisement and list of claims of estate. (R., 372)

On July 24, 1855, James W. Zacharie, under whom your petitioners claim here as heirs at law, filed in said court his application for probate of the holographic will of said Schatzell and due notice of said application was given. Alleged heirs of Schatzell filed a contest of said application and on November 1, 1855, the powers of said permanent administrators were suspended and one Samuel W. Fullerton was then appointed administrator pro tem., to serve during the contest of such application for probate of will.

On January 5, 1856, said will was probated but executor named therein did not qualify, and on February 2, 1856, said Samuel W. Fullerton was appointed administrator of estate, with will annexed, and he im-

mediately qualified, and then filed inventory, appraisement and list of claims of estate. (R., 373)

On March 1, 1856 said alleged heirs of Schatzell filed in District Court of Nueces County, Texas, their petition for certiorari, which was granted and the matter was removed to said District Court. Later the venue of said certiorari proceedings was changed to Galveston County, Texas, where no further proceedings were had therein until June 3, 1868, when said court dismissed the certiorari cause. (R., 373)

On April 28, 1856, said County Court of Nueces County, sitting in probate, appointed said Samuel W. Fullerton administrator pro tem of Schatzell's estate to serve during the pendency of said certiorari cause and contest of will, and said Fullerton immediately took oath and filed bond for $184,126.64. Said order of appointment referred to the certiorari proceedings then pending in District Court of Nueces County and defined said Fullerton's duties as such administrator pro tempore as follows: "Whose duty it shall be to gather and take into possession all the assets, demands and evidences of debt or title belonging to said estate, with full power and authority to do and perform all legal acts, and take such proceedings as shall or may be necessary to maintain him in the possession and charge of said estate and property, real and personal, so as to preserve the same and prevent its removal or waste, until the further order and decree of this court." (R., 373)

Pursuant to that order said Fullerton as administrator pro tempore had possession of the Schatzell estate subject to orders of said court.

On October 31, 1859, said Fullerton as administrator pro tempore of estate, still acting under said order of appointment of date April 28, 1856, applied to said

County Court for an order of sale of land in order to pay debts and expenses of administration. (R., 375)

In said application it was stated, among other things, as follows: "And the said administrator pro tem, herewith presents a statement of the estimated expenses of administration and of all claims against the estate which have been presented to him, specifying those allowed and those rejected by him, and those upon which suit has been instituted against him, together with the condition of said suit." In said application said administrator pro tem. suggested that some part of the real estate belonging to said estate be sold.

On November 2, 1859, by due order, said County Court granted said application for an order of sale and attempted to authorize said administrator pro tem. to sell, on a credit of twelve months, at public auction and to highest bidder, the tract of land involved herein. (R., 377)

On February 28, 1860, said Fullerton as administrator pro tem, filed his sworn report of sale of said land to one Robert Mott, for $3,100.00, on a credit of twelve months, "the purchaser securing the payment by a lien on the premises." (R., 378)

On February 29, 1860, said County Court, sitting in probate, entered an order attempting to confirm said report of sale by administrator pro tem. and to authorize him to execute and deliver to Mott a conveyance in due form upon Mott's compliance with the terms and conditions of sale; and on March 1, 1860, said Fullerton as administrator pro tem., acting pursuant to said order of sale and said order confirming sale, executed and delivered to Robert Mott the deed mentioned in opinion in Circuit Court of Appeals. (R., 379)

All of the respondents herein other than alleged

heirs of John Peter Schatzell, deceased, assert title and right under said attempted conveyance to Robert Mott.

SPECIFICATION OF ASSIGNED ERRORS

FIRST ASSIGNMENT OF ERROR

(Error No. 1 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred in finding that the deed of date March 1, 1860, executed and delivered by Samuel W. Fullerton as administrator pro tempore of estate of John Peter Schatzell, deceased, to Robert Mott was and is valid, and that it conveyed to Mott the title to the land described therein.

SECOND ASSIGNMENT OF ERROR

(Error No. 2 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred in holding that Samuel W. Fullerton as administrator pro tem. of estate of John Peter Schatzell, deceased, "had the power and authority to make a valid conveyance" of the land involved herein, because "the authority was vested in Fullerton by the order of the court directing that the sale be made" to Robert Mott, since said order was void.

THIRD ASSIGNMENT OF ERROR

(Error No. 3 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in refusing to follow and apply to the attempted sale made by Fullerton as administrator pro tem to Mott this principle of law which is well established by the several Texas decisions hereinafter mentioned, to-wit: that under the terms and provisions of the Probate Act of March 20, 1848, the chief justice of Nueces County had no power or jurisdiction, EITHER BY STATUTE OR AT COMMON LAW, to authorize the administrator pro tem. of an estate to sell and convey land belonging to such estate:

said refusal herein of said Circuit Court of Appeals was and is in direct conflict with all and singular these Texas decisions, to-wit:

Alexander vs. Barfield, 6 Tex., 400;

Dull vs. Drake, 68 Tex., 205, and 4 S. W., 364; and

Cruse vs. O'Gwin, 106 S. W., 757, writ of error refused by Texas Supreme Court.

FOURTH ASSIGNMENT OF ERROR

(Error No. 4 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in holding that under the Texas Probate Act of March 20, 1848, Samuel W. Fullerton as administrator pro tem. of estate of John Peter Schatzell, deceased, "had the power and authority to make a valid conveyance" of the land involved herein, because "the authority was vested in Fullerton by the order of the court directing that the sale be made" to Robert Mott: said ruling was and is erroneous because under that law the chief justice of Nueces County had no right or power to authorize a mere administrator pro tem. to sell and convey real estate belonging to the decedent. When properly construed, that probate law of March 20, 1848, by necessary implication and intendment provided that a valid sale of land belonging to the estate of a decedent, for the purpose of paying debts and expenses, could and should be made only by a regular or permanent administrator, or an executor, acting pursuant to express order of the County Court sitting in probate, authorizing such sale and conveyance of the land.

FIFTH ASSIGNMENT OF ERROR

(Error No. 5 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in upholding the validity of the deed executed and delivered

to Robert Mott by Samuel W. Fullerton as administrator pro tem. of the estate of John Peter Schatzell, deceased, since no right or power of sale was given to Fullerton as said administrator pro tem. in the order of April 28, 1856, appointing him such administrator pro tem. of the Schatzell estate and since the chief justice of Nueces County under the Probate Act of March 20, 1848, had no right or jurisdiction thereafter to increase or enlarge the rights and powers of said administrator pro tem.

SIXTH ASSIGNMENT OF ERROR

(Error No. 6 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in holding, in substance and in effect, that under the Probate Act of March 20, 1848, the chief justice of Nueces County, Texas, had the right and power, at all times between the date upon which the administration proceedings were begun upon the estate of John Peter Schatzell, deceased, and March 1, 1860, date of attempted conveyance to Robert Mott, to authorize and empower an administrator pro tempore of said estate to sell and convey land belonging to said estate: in other words, that said chief justice was empowered by law to authorize a mere administrator pro tem. at any time to do and perform every act which might or could have been performed, under appropriate order of court, by a permanent administrator of the estate.

SEVENTH ASSIGNMENT OR ERROR

(Error No. 10 in your Petitioners' Motion for Rehearing)

The Circuit Court of Appeals erred herein in these respects, to-wit: (a) In failing to follow and apply herein the principles of law announced by the Supreme Court of the United States in Erie Railroad Company vs. Tompkins, 304 U. S. 64; and (b) in failing to follow and apply herein the principles of law announced by the Supreme

Court of the United States in these several decisions, to-wit: West vs. American Telephone & Telegraph Co., Six Companies of California vs. Joint Highway District No. 13 and Fidelity Union Trust Co. vs. Field, all decided on December 9, 1940, and also, Stoner vs. New York Life Insurance Co., decided on December 23, 1940.

BRIEF OF THE ARGUMENT

It is believed that in the foregoing petition for writ of certiorari and in this supporting brief this proposition of law is sufficiently established, to-wit:

That the County Court of Nueces County, Texas, sitting in probate, was wholly without power on and prior to March 1, 1860, (date of attempted conveyance to Mott) to authorize Samuel W. Fullerton as administrator pro tem. of the estate of John Peter Schatzell, deceased, to sell and convey to Robert Mott the land involved herein.

Without repetition, we here adopt as a part of this argument the undisputed record facts stated on pages 2, 5, 8 and 17 hereof.

The precise question now under consideration has, we believe, been decided by Texas appellate courts in a manner directly contrary to that held by the Circuit Court of Appeals herein.

The facts involved in Alexander vs. Barfield, 6 Texas., 400, occurred prior to February, 1845, in which year the suit was instituted. In 1847 the death of the plaintiff was suggested but no new party plaintiff was made. By duly recorded order of date September 4, 1850, the chief justice of Shelby County, Texas, appointed Charles H. Alexander temporary administrator of estate, said order stating: "And he is hereby empowered to transact all business as administrator of said estate until one may be appointed in our court of law." Said order

was duly signed and attested. The temporary administrator sought to prosecute the pending suit. "The defendants objected to the authority so conferred on Alexander and to his being made a party: the objection was sustained and an order made that the suit should be dismissed, but no judgment to that effect was entered. The appeal was taken by C. H. Alexander," the temporary administrator.

In that case Supreme Court of Texas held as follows: (1) That as there was no judgment in the court below from which an appeal would lie, the appeal should be dismissed; and (2) "It will be seen, by comparing the evidence of the appointment of C. H. Alexander as recited with the article cited from the Digest, under which it is assumed that they were issued by the chief justice, that the requisitions of the law have not been regarded in scarcely a single particular. Instead of giving the limited powers for the particular occasion, they give general and full powers, without any reference to being made a party to the suit, which was the only ground on which, in this case, the chief justice had any authority to act. **The court below could not regard a pro tem. appointment of administrators as of any validity, and could only treat the same as a nullity."** (Bold Face ours)

The "article cited from the Digest," namely: Article 1136, was identical with Section 27 of Probate Act of March 20, 1848, which the court quoted in that opinion and which is set out on page 9 hereof.

The order of September 4, 1850, appointing a temporary administrator, was VOID because it attempted to give "general and full powers" and not "limited powers for the special occasion" to the temporary administrator.

In that case, at outset of opinion, the court said:

"There was no judgment entered by the court below, and on this ground we might dismiss the appeal without inquiring into the correctness of the order of the court to dismiss the case. But, as the question was raised in the court below and has been presented in this court, it is not believed to be improper to decide it now, **as it may be important in practice."** (Bold Face ours)

Any suggestion that the doctrine of obiter dictum applies to the holding therein that the chief justice of Shelby County had no power to authorize the temporary administrator "to transact all business as administrator of said estate until one may be appointed in our court of law" is sufficiently answered by this quotation from United States of America vs. Title Insurance Trust Company, 265 U. S., 472, 486, to-wit: "Where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.' "

Alexander vs. Barfield, supra, has never been overruled or even limited or criticised in any later Texas case.

In Dull vs. Drake, 68 Tex., 205, land was sold by a temporary administrator pursuant to order of court, report of sale by temporary administrator and its confirmation by the court. **The action was one in trespass to try title.** When the deed from the temporary administrator was offered in evidence, it was excluded by the court and the assignments of error on appeal related solely to its rejection. The Supreme Court of Texas specifically upheld that action of the trial court and sustained **the collateral attack** upon the proceedings had in the probate court: in other words, there the attempted sale of land made by a temporary administrator, although supported by express court orders, was held ut-

terly void for want of power on the part of the probate court to authorize such sale.

The only difference between that case and the instant case is this, to-wit: there the proceedings occured soon after the appointment and qualification of the temporary administrator, while here precisely like proceedings were had several years after the appointment and qualification of Samuel W. Fullerton as administrator pro tem. of estate of Schatzell, deceased.

Whatever may be argued with respect to the reasoning used in that opinion, there can be and is no escape whatever from this fundamental proposition, towit: there the Texas Supreme Court held, **on collateral attack,** that the probate court was without power to authorize a temporary administrator to sell and convey land. The reasons given by the court for the conclusion thus reached are unimportant.

Cruse vs. O'Gwin, 106 S. W., 757 (writ of error refused by Texas Supreme Court) was also an action of trespass to try title to land.

At the trial below the appellants offered in evidence a deed to the land executed and delivered in 1841 by a temporary administrator, acting pursuant to express orders of court directing such sale by him. The trial court held such deed void and rejected it as evidence.

Among other things the appellate court there said:

"The land in controversy was granted to Robert Lucas by the colonists in 1835, and appellees claim the land as his heirs, while appellants claim it through a deed made by John Lucas, (temporary) administrator of the estate of Robert Lucas, to David N. Evans, in 1841. That deed was held to be null and void by the trial judge and rejected, and the result of this appeal is dependent upon the propriety of that rejection."

Said sale to Evans was made by the temporary administrator pursuant to express orders of the probate court. One objection to said deed was that the probate court was without power to authorize a temporary administrator to sell and convey land. Discussing that and other questions involved, the court said: "If there is sufficient evidence to indicate that there was no order of sale by **the permanent administrator,** and if the circumstances are of such a nature as to preclude a presumption of the existence of such, **there is no necessity for any other reason for the invalidity of the deed to be given.** *** Temporary administration is permitted only because the exigency requires some one to take charge of and protect the estate in the interim that necessarily arises between the death and a permanent administration, and **a strict construction is always given** to statutes relating to the powers and duties of a temporary administrator. **The power to sell land has not been given to him by law."** (Bold Face ours)

It should be especially observed that in Cruse vs. O'Gwin, just as in Dull vs. Drake, the attack on the attempted sale of land by the temporary administrator of an estate was **wholly collateral,** and not direct.

In this connection possibly it should be stated that in Texas the law has long been thoroughly settled that any order of a court of general jurisdiction may be attacked collaterally at any time, by any one, if and whenever it **affirmatively appears from the record in the cause** in which such order was made that said order was beyond the power or jurisdiction of the court to make, in any event or for any purpose.

In this case we make no attack upon the orders of County Court of Nueces County, Texas, attempting to authorize Fullerton as administrator pro tem. to sell and convey to Robert Mott the land involved herein, on the

ground that **the purposes** for which said sale was attempted to be made were not such as would support the sale: on the contrary, our "attack" is based solely upon the proposition that under the Act of March 20, 1848, said County Court had no power or jurisdiction whatsoever to authorize a mere administrator pro tem. of the estate of a decedent to sell and convey land for **any purpose whatsoever,** whether for payment of debts and expenses or otherwise, and that no valid sale of land belonging to the estate of the decedent could have been made under that law save and except by the executor or a permanent administrator, acting under proper orders of probate court.

Moreover, in making our "attack" on those orders of court we do not even remotely attempt to use any evidence **aliunde the record** in the probate cause involving the administration of the estate of Schatzell, deceased: on the contrary, the entire lack of power or jurisdiction on the part of County Court of Nueces County to authorize Fullerton as administrator pro tem to sell and convey land, appears affirmatively on the face of the record in that probate cause, from which it conclusively appears that the attempted sale to Mott was made by a mere administrator pro tem. acting under void orders of County Court, sitting in probate—same being thus void because not within the power of the court to make for **any purpose whatsoever.**

There was and is no legal difference between Sections 27 and 28 of the Act of March 20, 1848, re powers of an administrator pro tem. and Articles 3373 and 3378 of the present Statutes of Texas, each of which last mentioned articles has been a part of Texas probate law since 1876.

In Rose vs. Newman, 26 Texas., 131, 133, the action was one in trespass to try title to land. It was there held

that the County Court, sitting in probate, was without power to authorize a commissioner to sell and convey land. It was there said: "However plenary the powers of the County Court may be upon the subject of a partition of a deceased person's estate, when a sale of property becomes necessary to carry out the partition, the administrator must sell and execute his deed, to divest the estate of the title. The District Court might as well appoint a commissioner to levy upon and sell property in satisfaction of a judgment for money, while there was a sheriff, as for the County Court to appoint a commissioner to sell the land of an estate while there was an administrator. And if there were no administrator, from death or resignation, there could be no such action of the court until one was appointed. The estate is vested in the heirs, subject only to such disposition of it as may be necessary to be made by the administrator under orders of the court, to pay debts, to make partition and the like. It is, therefore, not a sale by any one who, through the authority of the County Court, in the administration of Lockhart's estate, could make a title."

A like ruling was made in Stafford vs. Harris, 17 S. W., 530, 532, wherein the Court said: "It has been held by our Supreme Court that a sale made by a commissioner appointed by the County Court in such case is void. Rose vs. Newman, 26 Texas, 132. While the County Court, in the administration of estates, is a court of general jurisdiction, and, having jurisdiction of the subject matter, every presumption is indulged in favor of the rightful exercise of its jurisdiction, still, when an order shows on its face the entire want of jurisdiction to make the same, it must be held invalid, and may be impeached in a collateral proceeding. The report of sale was of the sale of the land as made by a person who was unauthorized to make it. It was of a void sale. The order of confirmation undertakes to confirm a sale which

appears from the order itself to be a void sale. A purchaser looking to the order of confirmation would be informed that it was made by a person who was unauthorized by law to make it, and consequently of its nullity. It follows that there was not a valid decree of confirmation in the proceedings to make the sale for partition sufficient to protect J. W. Harris in his purchase of the land."

No substantial legal difference can be suggested between "a commissioner" to sell land belonging to the estate of a decedent and "an administrator pro tem.", asserting such right of sale.

The "limited powers" mentioned in Sections 27 and 28 of Act of March 20, 1848, necessarily mean the very opposite of "full powers": and in order to ascertain the meaning of the words "full powers" we must turn to said Probate Act of March 20, 1848, and to those principles of the common law not in conflict with its provisions.

Neither said Act nor the common law authorized the chief justice or the County Court of Nueces County to confer "full powers" on a mere administrator pro tem.

Under the opinion of the Circuit Court of Appeals herein the chief justice of Nueces County had the power to confer on Fullerton as administrator pro tem. not merely "limited powers" but "full powers", "unlimited powers", powers which could not be exercised at all even by a regular administrator or executor in the absence of express statute giving such powers to the court, by a radical modification of the common law on that subject.

It is submitted that the County Court of Nueces County had no power to authorize Fullerton as administrator pro tem. to perform any act, such as the sale of

land, which at common law could not have been performed by a temporary administrator or administrator pendente lite: this, (1) because said Act of March 20, 1848, granted no such right or power to the chief justice or to the court as such and (2) because section 135 of that Act applied common law principles to all acts and matters not specifically covered and provided for in the Act itself.

Ever since January 20, 1840, Texas has been a common law state. (See: 9 Texas Jurisprudence, page 306, Section 8) Hence, the inclusion in said Probate Act of March 20, 1848, of Section 135, making the common law of England a part of that Act except as in said Act otherwise provided, was really unnecessary and surplusage, and such inclusion therein merely emphasizes the proposition that the Legislature of Texas intended that neither executors or administrators nor administrators pro tem. should have or exercise power or authority not therein expressly granted or granted by the principles of the common law, and especially that neither the chief justice nor the County Court, sitting in probate, should have power or authority to grant to executors or administrators, or administrators pro tem., power and authority not specifically provided for in that Act, unless such power or authority came within the principles of common law as enforced and applied in Texas on and after January 20, 1840.

"At common law the administrator had no duty with respect to the realty, since it was not subject to the debts of the decedent" (13 Texas Jurisprudence, page 749).

Upon diligent search, we have found no case in the United States wherein a temporary administrator or administrator pro tem. or administrator pendente lite was held to have the power to sell and convey land, or where a sale of land made by such administrator pro

tem. or pendente lite was held valid, except where the power was given by express statute, which prescribed in detail how such power should be exercised.

"The duties of special or temporary administrators under modern practice are generally to collect and preserve the property and to hand over the assets to the general representative when appointed or qualified, and beyond this their powers do not extend, being strictly limited to those prescribed by statute." (24 Corpus Juris, 1180)

"In the absence of statutory authority, special administrators have no power to allow or reject claims against the estate, nor have they any authority to pay debts or to sell property for their payment." (24 Corpus Juris, 1181, 1182)

It should be particularly observed that under said Probate Act of March 20, 1848 (and the same is true under present probate statutes of Texas), an administrator pro tem. or a temporary administrator had, and could have, absolutely **no statutory powers** whatsoever. That Act contains nothing re the powers or authority of an administrator pro tem. other than as set out in Sections 27 and 28 thereof. Each of those sections merely authorizes the chief justice to grant to an administrator pro tem. "Such **limited powers** as the circumstances of the case may require."

In other words, in Texas it has been the law since March 20, 1848, that an administrator pro tem. is **without any statutory power whatsoever:** his every act must find support in his order of appointment defining his "limited powers".

In its opinion herein the Circuit Court of Appeals drew no distinction whatever between the "full powers" granted to executors and administrators by the Act of

March 20, 1848, and the "limited powers" such as might be conferred upon a mere administrator pro tem.

Certainly, the power to sell and convey land belonging to the estate of a decedent is "a full power", the very highest type of power, the greatest power which can possibly be exercised by an administrator or a court.

Bearing in mind that Texas adopted the common law of England in 1840, that such "common law" has ever since then been an integral part of Texas laws, that at common law no title to land belonging to a decedent ever vested in, or could be sold by, even a regular or permanent executor or administrator, and further that Section 135 of said Probate Act of March 20, 1848, expressly provided that "the rights, powers and duties of executors and administrators shall be governed by the principles of the common law, where the same does not conflict with the provisions of this Act", and, finally, that said Act of March 20, 1848, conferred no powers whatsoever, either "full" or "limited" upon administrators pro tem., it seems to follow, as night follows the day, that County Court of Nueces County had no power, when originally appointing Fullerton administrator pro tem. of Schatzell's estate, to empower him as such administrator pro tem, to exercise any authority which could not be exercised by a temporary administrator under principles of the common law of England, such as the sale of land.

The power which County Court of Nueces County attempted to confer upon Fullerton as administrator pro tem. was assuredly as "unlimited" and as "full" as can possibly be imagined: that attempted power was neither a "statutory power" nor a power granted or permitted by the common law of England.

No Texas court has ever held that the County Court, sitting in probate, had or has jurisdiction or power to

authorize a mere temporary administrator or administrator pro tem. to sell and convey land belonging to the estate committed to his charge—this, whether for the purpose of paying debts, expenses of administration, etc. or otherwise.

Respondents herein are represented by as thoroughly competent, able and diligent lawyers as any in Texas: yet, notwithstanding their ability, zeal, diligence and learning they have not found nor cited in either of the lower courts any Texas case holding that a Texas probate court has the power or jurisdiction to authorize a temporary administrator or administrator pro tem. to sell and convey land for any purpose or under any conditions whatsoever.

The simple truth is that **there is no such Texas case.**

In its opinion herein Circuit Court of Appeals has construed Sections 27 and 28 of Probate Act of March 20, 1848, precisely as if each section had used the words "with such UNLIMITED powers as the circumstances of the case require". In its interpretation of those sections said court has, we think, failed to give proper weight to the fact that in Section 28 the "limited powers" which the chief justice could grant to the administrator pro tem. were in the sharpest possible contrast with the "full powers" which that Act itself granted to executors and administrators.

When considering the several Texas statutes herein mentioned with respect to the powers of an administrator pro tem., and of the court appointing him, there should be applied the well established rule of interpretation that the expression of one thing is the exclusion of all other things, and that when a statute limits or provides that a particular thing shall be done in a particu-

lar mode, it by necessary implication negatives any other mode.

In Botany Mills vs. United States, 278 U. S., 282, the court said:

"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode".

The Act of March 20, 1848, expressly limited the allowance or rejection of claims against the estate of a decedent and the right to sell land for payment of debts and expenses of administration to "executors and administrators". Especially, that very comprehensive Act was silent as to any allowance or rejection of claims, or any sale of properties, by an administrator pro tem.

In Birdwell vs. Kaufman, 25 Tex., 189, the Supreme Court of Texas said:

"The subsequent Act of 1848, concerning the settlement of estates, provides that 'every claim for money against a testator or intestate shall be presented to the executor or administrator within twelve months after the original grant of letters testamentary or of administration; or payment thereof shall be postponed', etc.; also, 'that no executor or administrator shall allow any claim for money against the testator or intestate', unless such claim be duly verified."

"When it is considered that the Act of 1848 was evidently designed to afford a system of rules for the settlement of the estates of deceased persons complete within itself, and to comprise the only rules which should govern in their settlement, it seems difficult to conclude that a claim for money against estates could be established so as to entitle it to be paid through the court's administration in any mode other than that which the statute prescribes".

In Ragsdale vs. Prather, 132 S. W. (2d), 625 (writ of error refused by Texas Supreme Court) it was said: "It is basic and fundamental that in a proceeding for the appointment of an (permanent) administrator neither the probate court nor the District Court, exercising appellate jurisdiction, can finally pass upon the validity or invalidity of claims asserted by or against the estate of the deceased"—in other words, under Texas probate laws only a qualified permanent administrator has the power to allow or reject claims: that power is not given to temporary administrators or an administrator pro tem. such as was Fullerton.

In the case last cited it was also said: "The appointment of an (permanent) administrator was essential to the proper protection of the asserted rights of both appellee and appellant. Appellant suggests that if this court deem the appointment of an administrator necessary, that we limit his authority. **To limit the authority of administrators is beyond the jurisdiction of the court. The law fixes his duty and powers."** (Boldface ours)

A Texas probate court has no power either to limit the authority of a permanent administrator or to confer upon an administrator pro tem any powers other than such "limited powers" as may be stated in order of appointment, not "full powers" or "unlimited powers".

A reading of the Texas statutes mentioned on pages 9 and 10 of foregoing petition will disclose that the powers of an administrator pro tem. appointed under those laws were only those ordinarily exercised or possessed by temporary administrators of estates and were intended merely for the temporary protection of the estate pending appointment and qualification of an executor or administrator.

The appointment of an administrator pro tem. under

Section 27 of Act of March 20, 1848, automatically "ceased to be of force on the first day of the term of the court next after the date" of such appointment, unless continued in force by special order entered in minutes of court, and further "in no case" did such appointment continue in force beyond the first day of the second term of court next after date of appointment of administrator pro tem.

However, under Section 28 an administrator pro tem. appointed because of a contest relative to the probate of a will or to the granting of letters of administration was continued in force until termination of said contest and until "the appointment of an executor or administrator with full powers". Said Section 28 contemplated the appointment of such administrator pro tem. whether the contest should be in the County Court or "in any other court on appeal": also, said Section 28 made it "the duty" of the chief justice to appoint an administrator pro tem. in case of a contest of probate of a will, whether in County Court or any other court on appeal. Such appointment in case of a contest was not optional but mandatory.

Section 27 provided that the regular or permanent executor or administrator should have **"full powers"** but that the administrator pro tempore should have only "such **limited powers** as the circumstances of the case may require", and further provided that the order of appointment "shall define the powers conferred" on an administrator pro tem.

Under the Probate Act of March 20, 1848, every executor or administrator had "full powers", whereas every administrator pro tem. had merely "such limited power as the circumstances of the case required", and such as should be defined in order of appointment.

As in Section 27, Section 28 provided that the administrator pro tem. appointed thereunder should have only "such **limited powers** as the circumstances of the case requires," pending termination of contest and appointment of executor or administrator "with **full** powers".

The Texas Probate Act of March 20, 1848, was very comprehensive and wholly free from ambiguity, and evidently prepared with much care by able lawyers. Its express provisions exclude the thought that the County Court, sitting in probate, could, when appointing an administrator pro tem., under either Section 27 or Section 28, grant to such administrator pro tem. **all** of the powers granted by that Act to "executors or administrators", including the right to allow or reject claims against the estate and, especially, the right to sell and convey land belonging to the estate of a decedent.

In the alternative, only, if that Act of March 20, 1848, be examined in the light of the usual rule of interpretation that the expression of one thing in a statute should be construed as the exclusion of all other things, and/or in the light of the rule of interpretation of statutes based upon "associated words", then and in any event by necessary implication that law, construed as a whole, did not confer on the County Court the right or power to authorize a mere administrator pro tem. to sell and convey land belonging to the estate of a decedent.

Finally, and still in the alternative, only, as herein shown, that Act of March 20, 1848, has been so construed by Texas courts as to deny to the County Court sitting in probate the right or power to authorize a mere temporary administrator or administrator pro tem. to sell and convey land belonging to the estate of a decedent; and that interpretation by Texas courts of that law is binding upon all other courts, even if such inter-

pretation may be different from the interpretation which this court might or would place on said Act as an original proposition.

The basic question involved herein, to-wit: the right or power vel non of County Court of Nueces County to authorize Fullerton as administrator pro tem. of Schatzell estate to sell and convey the land involved herein, necessarily depends upon the proper interpretation of said Probate Act of March 20, 1848: and that in turn depends largely upon the inclusion therein of Section No. 135 reading thus: "That the rights, powers and duties of executors and administrators shall be governed by the principles of the common law, where the same does not conflict with the provisions of this Act".

As early as 1846, in Thompson vs. Duncan, 1 Tex., 485, the Supreme Court of Texas said:

"The rule of the common law is that the personalty shall go to the legal represenative, and the realty shall descend to the heir, on the death of his ancestor. The heir takes the land subject to a particular grade or dignity of debts, but the personal representative has nothing to do with it. By statute, some modifications have been made, but none of them, is it believed, makes lands assets in the hands of the administrator. In some of the states of the Union the common law rule is in force, and in others it has been so qualified as to make the lands contingently a fund in the hands of the administrator to be sold by him, and the proceeds applied to the payment of debts of every kind, where the personalty is insufficient; in such cases it would seem he could sue for land, which might be necessary to pay debts, if it was held against the better title of his intestate. The difference in the rule of the common law between land and personal property never had existence in this country".

That case was decided some time prior to March 20, 1848, and upon facts which arose in or prior to 1842.

"At the common law it was held that real property descended directly to the heirs of a decedent, and with that the executor or administrator had no concern, the management, settlement, or administration of the estates of deceased persons relating primarily and fundamentally to personal property alone". (23 Corpus Juris, page 998, Section 8) See, also: 23 Corpus Juris, page 1136, Section 328, note 87, citing cases from many state courts. Also, see: 24 Corpus Juris, page 459, Section 1261.

The inclusion in that Act of March 20, 1848, of said Section 135 shows that the Legislature of Texas preferred the principles of the common law, as same then existed in England, with respect to the estates of decedents, to the principles of the civil law as same had until then existed in Texas, as to such estates.

Said Section 135 greatly emphazies the strictness with which Texas courts have always construed those parts of said Act of March 20, 1848, relating to administrators pro tem, especially where land is involved.

It is our understanding that under the common law of England an administrator pro tem. (or, pendente lite) had nothing whatever to do with land owned by the decedent but his powers were limited wholly to personal and mixed properties.

"In the absence of anything in the statute clearly indicating a contrary intent, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and where its meaning in one instance is clear, this meaning will be attached to it elsewhere". (59 Corpus Juris, page 1003, notes 82 and 83, citing cases, including: Pampanga Sugar Mills vs. Trinidad, 279 U. S. 211;

Feder vs. Goetz, 264 Fed., 619; and Lewelyn vs. Harbison, 31 Fed. (2d), 740, certiorari denied.)

Applying that rule of interpretation to the expression "executor or administrator" and to the word "administrator", as so frequently used in said Probate Act of March 20, 1848, the conclusion seems irresistible that the word "administrator" wherever used in that law was intended to mean and did mean "a regular administrator", "a permanent administrator", as contra-distinguished from the "administrator pro tem." specially mentioned in Sections 27, 28, 29 and 116 of that law—those four sections being the only ones in which any mention is made of administrators pro tem.

That all parts of said Probate Act of March 20, 1848, should properly be construed in the light of Section 135 thereof, adopting the principles of the common law of England then in force, is illustrated by these two late Texas decisions, to-wit: Miller vs. Letzerich, 121 Tex., 248; and Powell vs. City of Amarillo, 57 S. W. (2d), 233 and 93 S. W. (2d), 144.

Unquestionably, on March 20, 1848, in England a mere temporary administrator or administrator pendente lite could not be authorized by the court to sell land belonging to the estate of his intestaate.

In construing said Act of March 20, 1848, more especially with regard to the power vel non of the County Court to authorize a mere temporary administrator pro tem. to sell and convey land belonging to the estate, due regard should be given to the doctrine of "associated words", as illustrated by Russell Motor Car Company vs. United States, 261 U. S., 514 and 59 Corpus Juris, page 979, Section 579.

Repeatedly in that Act of March 20, 1848, we find the words "executor or administrator". Among those very

numerous sections thus using said associated words are those directly relating to presentation of claims against the estate, the allowance or rejection thereof, sales of property which may be made only for the purpose of paying debts and expenses of administration, etc. Section 67 thereof provided thus: "That when a sale of property is ordered under the provisions of this Act, it shall be the duty of the executor or administrator to make such sale or cause it to be made in obedience to the order, at the earliest period; and when such sale has been made, it shall be the duty of the executor or administrator to return to the court that ordered the sale an account thereof", such account to be "sworn to and subscribed by such executor or administrator before some officer authorized to administer oaths"; also, that if the court should be satisfied with such sworn report, the court should confirm such sale and order "a conveyance to be made to the purchaser of either land or slaves by the executor or administrator". Also, that following decree of confirmation and upon compliance by purchaser with terms of sale, "the executor or administrator shall execute and deliver to him a conveyance of the property so sold, if it were either land or slaves."

Section 72 of the Act provided thus: "That whenever an executor or administrator sells property of the estate he represents, on a credit **** he shall take the note of the purchaser for the amount of his purchase with good personal security; and if land or slaves have been sold, he shall also take a mortgage upon the property sold, to secure the payment of the purchase money".

Doubtless it would have startled the able lawyers who wrote that carefully prepared Probate Law if they had been told that, notwithstanding its clarity, it would years later be asserted that the County Court, sitting in probate, had the right or power to confer on mere

administrators pro tem., appointed under either Section 27 or Section 28, not merely "limited powers" but ALL OF THE POWERS AND AUTHORITY, "the full powers" therein mentioned, as to be exercised only by "executors or administrators".

If the decision of the lower courts herein was and is sound in law, then it necessarily follows that the county judge of every one of the 254 counties in Texas has an absolute right to decide in every probate case filed in his court, whether he will have the estate administered by a "permanent" administrator, in accordance with Texas probate laws, or dispense entirely with a regular administration of the estate and "do a turnkey job" by and through a mere temporary administrator, thereby dispensing effectually and entirely with all of the numerous safeguards which our Texas probate laws have provided for the protection of creditors, heirs at law, devisees, etc.

Under the decision herein by the Circuit Court of Appeals every Texas county judge may at any time, at his own discretion, appoint a temporary administrator and confer upon him any and all powers and authority, including the right to sell real estate, which to the judge may seem right and proper; and thereafter, from time to time, and as often as he may deem necessary, such judge can enlarge the powers of such temporary administrator, and thus completely administer and distribute the entire estate without even an attempt at compliance with requirements of probate laws of Texas.

If under the Act of March 20, 1848, the chief justice had the power to enlarge the authority of the temporary administrator at any time so as to include the right to sell and convey land, then undoubtedly such chief justice had such right and power when making the original appointment of such administrator pro tem.

Under that Act, either that power or jurisdiction existed initially and continuously thereafter until close of administration or same never existed at all.

We plant ourselves squarely upon the basic proposition that the chief justice of Nueces County, Texas, had absolutely no power, under the Probate Act of March 20, 1848, to authorize Fullerton as a mere administrator pro tem. to sell and convey the land involved herein: if that proposition be sound, then it is unimportant whether said Act did or did not require that the powers of the administrator pro tem. be set forth in his order of appointment or whether the necessary legal effect and interpretation of that Act was to nullify acts performed by the administrator pro tem. which were not expressly authorized in his order of appointment.

If the chief justice of Nueces County had no right or power to authorize Fullerton as a mere administrator pro tem. to sell and convey the land involved herein, then certainly he could not, and did not, create such power, contrary to the Act itself, by the simple device of including or "specifying" such power in his order attempting to authorize a sale of said land.

Nothing that the chief justice of Nueces County did, or left undone, could by any legal possibility clothe him with a power to perform any act not authorized, either expressly or by necessary implication, by the law itself.

After all, the vital question is, not what power or authority the chief justice of Nueces County specified in his order pursuant to which Fullerton as administrator pro tem. attempted to sell and convey to Mott, but what power or authority did the Act of March 20, 1848, authorize said chief justice to grant to Fullerton as an administrator pro tem.? If it was a power authorized by that Act, then the administrator pro tem was author-

ized to execute and deliver the deed to Mott, etc.: on the other hand, if that law did not so empower the chief justice to authorize said administrator pro tem, to sell and convey land, then the attempt of the chief justice to confer such authority on said administrator pro tem. was void for want of power or jurisdiction, regardless of recitals in the order or orders.

It may be assumed that the chief justice of Nueces County **thought** on March 1, 1860, that as a court he had the right and power under the Act of March 20, 1848, to authorize Fullerton as administrator pro tem. to sell and convey the land involved herein but, emphatically, his mere thought or belief to that effect did not itself authorize him to empower such sale of land by administrator pro tem. The existence vel non of such power necessarily depends upon the proper interpretation of the Act of March 20, 1848, and not upon the erroneous belief or assumption of such power.

It was and is a case of entire lack or want of power, and not merely a case of an erroneous exercise of an admitted power or jurisdiction.

In the Circuit Court of Appeals able counsel for respondents argued in substance that if, when attempting to authorize Fullerton as administrator pro tem, to sell and convey the land involved herein, the chief justice of Nueces County **thought,** that under the Act of March 20, 1848, he had the power to authorize such sale by a mere administrator pro tem., that would forever foreclose any inquiry with respect to the proper, legal interpretation of the Act itself, re sale of land owned by the decedent, and the chief justice himself was the sole judge of the powers conferred upon him by the Act of March 20, 1848.

The fallacy of that argument is too plain to require discussion.

No judge is the sole judge of his own powers and jurisdiction: in every "government of law and not of men" all such questions must depend upon constitutional or statutory provisions, or on well established principles of the common law.

In the court below able counsel for respondents also argued in substance that Mott was not charged with knowledge of the limited powers conferred on Fullerton in the original order of date April 28, 1856, appointing him administrator pro tem of estate: however, that question is purely academic in view of the undisputed, record proof that the application for crder of sale, the order of sale, the report of sale, and the confirmation of sale, leading up to the deed from the administrator pro tem. to Mott, on their face showed that in said matters Fullerton was acting solely as an administrator pro tem. of the Schatzell estate. Thereby Mott was put upon notice that he was dealing with a mere administrator pro tem. and not with "a permanent administrator", acting under order of court.

When thus dealing with a mere administrator pro tem. Mott necessarily knew, as matter of law, that the probate court had no power, whether in original order of appointment of administrator pro tem. or in later orders, to empower Fullerton as a mere administrator pro tem. to sell and convey land, no such power having been conferred on the probate court by the Act of March 20, 1848, but directly to the contrary, at least by necessary implication.

In Cline vs. Niblo, 8 S. W. (2d), 633, the Supreme Court of Texas said:

"Irrespective of the character or dignity of the tribunal pronouncing the decision, whether of inferior, limited or superior general jurisdiction, **it must confine**

its determination within the authority it possesses under the law and the case. If the court is exercising special statutory powers, the measure of its authority is the statute itself and a judgement in excess thereof is null and void, and subject to collateral attack, **a rule which finds frequent application in the case of probate judgments".** (Boldface ours)

In Harrison vs. Barngrover, 72 S. W. (2d), 971 the court said:

"It has long been recognized in this state that probate courts have only such powers as are delegated to them by statute. St. Paul Sanitarium vs. Crim, 84 S. W., 1114 (writ of error denied); Marks vs. Hill, 46 Texas, 345; Smith vs. Paschal (Texas Commission of Appeals), 1 S. W. (2d), 1086; Cline vs. Niblo, 117 Texas, 474". Also the court there said: "For any court to act within its jurisdiction, in the sense that its judgment is immune from collateral attack, it must not only have jurisdiction of the parties and of the res or property to be dealt with, but it must also have **the power to enter the kind of order,** judgment or decree which is the subject of the attack", citing cases. (Boldface ours)

Our Texas Supreme Court refused application for writ of error in Harrison vs. Barngrover, thereby approving the opinion therein. This court denied petition for writ of certiorari. 294 U. S., 731.

The decision herein of the Circuit Court of Appeals conflicts, in principle, with Moyers vs. Carter, 61 S. W. (2d), 1027, writ of error denied by Supreme Court of Texas. In that case the probate court appointed Moyers temporary administrator with authority to make and file proofs of death and to collect proceeds of a certain life insurance policy payable to estate of a decedent. Moyers promptly qualified as temporary administrator, collected

proceeds of policy, paid claims for the last sickness, funeral and hospital expenses of the decedent, which claims were duly verified by claimants and were approved by the temporary administrator and were allowed by the probate judge as claims of the first class, aggregating $500.00. A creditor of the decedent presented to the temporary administrator its claim, duly verified, which the temporary administrator allowed as a claim of the third class and the probate judge so approved said claim. The temporary administrator applied net proceeds of policy, over and above the $500.00, in partial satisfaction of said secured claim of said creditor. **The probate court approved all these acts** of the temporary administrator and closed up the administration, decreeing that there was no necessity for permanent administration. Said payment by temporary administrator to said creditor was held by the appellate court to be void. There the court among other things said:

"This case, as presented both by pleadings and evidence, shows a clear necessity for an administration in the probate court in order to make the statutory allowances for an indigent surviving wife and minor child. The (probate) court correctly appointed a temporary administrator to collect and hold in its possession the proceeds of insurance policy. The probate court, when it permitted the temporary administrator to go beyond this power, and thereby to dissipate the entire estate during the temporary administration, acted in violation of the terms of Article 3379 of our probate laws, and hence the orders were void, as declared by such statute. Allar Company vs. Roeser (Texas Civil Appeals), 217 S. W., 442; Dull vs. Drake, 68 Texas, 205; Cruse vs. O'Gwin, 48 Texas Civil Appeals, 48; 106 S. W., 757; Dodge vs. Youngblood (Texas Commission of Appeals), 245 S. W., 225; Fenimore vs. Youngs, 119 Texas, 159".

The decision herein by the Circuit Court of Appeals conflicts, in principle, with the decision of Court of Civil Appeals of Texas in Barfield vs. Miller, 70 S. W. (2d), 632, in which case application for writ of error was dismissed by Texas Supreme Court.

The essence of that opinion is thus correctly stated in paragraph 10 of syllabus, to-wit: "Where probate court had directed appointment of temporary administratrix as permanent administratrix on executing bond and taking oath, but such person had not qualified as permanent administratrix when probate court ordered property sold to satisfy a judgment against the estate, proceedings for such sale held void, since there was no legal representative of estate at time".

Wholly aside from the conflict between the opinion of the Circuit Court of Appeals herein with applicable Texas statutes and decisions as hereinabove cited and discussed, said opinion is likewise in conflict with Texas cases, hereinafter cited, in this respect, to-wit:

As elsewhere herein stated, Samuel W. Fullerton was appointed administrator pro tempore of the Schatzell estate by order dated April 28, 1856, which provided as follows: "That Samuel W. Fullerton be and he is hereby named and appointed administrator pro tempore of the aforesaid estate of John P. Schatzell, deceased, during the pendency of the controversy in the case, whose duty it shall be to gather and take into possession all the assets, demands and evidences of debt or title belonging to said estate, with full power and authority to do and perform all legal acts, and take such proceedings as shall or may be necessary to maintain him in the possession and charge of said estate and property, real and personal, so as to preserve the same and prevent its removal or waste, until the further order or decree of this court". Said order fixed his bond as administrator pro

tem. in the sum of $184,126.64, which he promptly gave. (R., 502 and 503)

Fullerton was acting as administrator pro tempore of that estate under said appointment, and acting in no other capacity, when he applied to the court for an order to sell property belonging to the estate and when the court attempted to authorize him as administrator pro tempore to sell and convey to Mott. (R., 373 to and including 380)

It will be seen that in his original order of appointment Fullerton as administrator pro tempore was not authorized by the court either to pass upon claims against the estate of the decedent or to sell property of any kind belonging to the estate; his original duties were merely those ordinarily performed by an administrator pro tem.

That said court had no power after April 28, 1856, date of such original appointment, to enlarge or increase the powers of Fullerton as an administrator pro tem. so as to authorize him to allow claims or to sell and convey land belonging to said estate, is supported by these Texas cases, to-wit:

Dull vs. Drake, 68 Texas, 205;
Willis vs. Pinkard, 52 S. W., 626;
Stewart vs. Poinbeouf, 201 S. W. 1025;
Lemp Brewing Co. vs. LaRose, 50 S. W., 460;
Allar Co. vs. Roeser, 217 S. W., 442;
Tolivar vs. Lombardo, 88 S. W. (2d), 733;
Dodge vs. Youngblood (Texas Commission of Appeals), 245 S. W. 225; and
Ramirez vs. Bank, 82 S. W. (2d), 523.

In Dull vs. Drake, supra, the court said:

"Our probate law does not contemplate that a temporary administrator shall have any powers except such as are expressly granted to him by the county judge **at the**

date of his appointment".

In Willis vs. Pinkard, supra, the court among other things said:

"The statute authorizing the appointment of temporary administrators prescribes the manner of their appointment, and provides that 'they shall have and exercise only such rights and powers with regard to the estate ***** as are specifically and clearly expressed in the order of the court appointing them, and any acts performed by them as such administrators that are not so expressly authorized shall be void.' Revised Statutes, Article 1935. Our courts have uniformly given this statute a strict construction, not only because such construction is authorized by the very terms of the Act itself but because excellent reasons exist why the powers of a temporary administrator should not be extended beyond those clearly intended to be conferred by the court appointing him. The appointment may be made upon the court's own motion, without notice, and before the estate, and the condition of it, has been otherwise brought within the cognizance of the probate judge. No party at interest has the opportunity to protest, whatever objection might be urged to the character or capacity of the individual appointed. **** Nothing short of the emergency contemplated by the statutes would authorize the courts to appoint a temporary administrator in any case, and it cannot be successfully contended that the powers of a temporary administrator should be dangerously extended in the absence of all emergency".

In essence, said Article 1935 of Texas Revised Statutes (in force when Willis vs. Pinkard was decided) is the same as Section 27 of the Probate Act of March 20, 1848, set on page 9 hereof.

As already shown hereinabove, in Alexander vs.

Barfield, 6 Texas, 400, Texas Supreme Court held that the probate court was without power to authorize an administrator pro tem, appointed soon after the death of the intestate, to "transact all business as administrator of said estate until one may be appointed in our court of law."

Now, if, under Alexander vs. Barfield, the probate court had no power on April 28, 1856, to authorize Fullerton as administrator pro tem. to pass upon claims and to sell and convey land belonging to the estate, but if, as found by the Circuit Court of Appeals, that power did exist on November 2, 1859, it is interesting to speculate on just what date between those two dates the County Court of Nueces County first acquired and thereafter had the right and power to authorize such sale of land by Fullerton as administrator pro tem, for the purpose of paying claims against the estate theretofore allowed by him in his said capacity of administrator pro tem?

Obviously, the only possible legal answer is that there was never a time, under Texas Statutes and decisions, when the County Court of Nueces County, Texas, had the power to authorize Fullerton as administrator pro tem. either to allow claims against the estate or to sell land belonging to the estate in payment of any such allowed claim.

CONCLUSION

In conclusion, we respectfully insist that in its decision of this cause said Circuit Court of Appeals clearly and erroneously departed from the long settled rules of property of the State of Texas and that its holding that the deed to Mott from Fullerton as administrator pro tem of estate of Schatzell conveyed to Robert Mott the title to the land therein described is squarely in conflict with the Texas decisions cited and discussed in our peti-

tion for writ of certiorari and in the foregoing supporting brief, and that said decision herein is erroneous.

Wherefore your petitioners, first above named, respectfully pray that the Supreme Court of the United States will grant to them a writ of certiorari to said Honorable Circuit Court of Appeals for the Fifth District in said cause No. 9662, Frank A. Ash and Mary Zacharie Brock, et al. vs. Barnsdall Oil Company, et al., and that following the granting of such writ the Supreme Court of the United States will in all things vacate and reverse the judgment rendered in said cause by said Circuit Court of Appeals and grant to your petitioners any and all such relief, general and special, legal and equitable, as they may be entitled to receive upon the undisputed facts involved herein and the law applicable thereto.

As your petitioners will ever pray.

Respectfully submitted,

GRADY BARRETT
JAMES M. BARNETT
WALTER M. LEWRIGHT
J. B. LEWRIGHT
Attorneys for Mary Zacharie Brock, et al., Petitioners.